

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

MV TRANSPORTATION, INC.

Employer
and

Case 05-RC-210354

**The Office & Professional Employees
International Union, Local 2, AFL-CIO**

Petitioner

MV TRANSPORTATION'S REQUEST FOR REVIEW

Pursuant to Section 102.67(c) and 102.69(c) of the Rules and Regulations of the National Labor Relations Board (the "Board"), MV Transportation, Inc. ("MV Transportation" "Company" or "Employer"), files this Request for Review of the Decision and Direction of Election issued on August 8, 2018, by the Acting Regional Director for Region 5 (hereinafter the "Decision"). As outlined in the rules, if the Regional Director issues a Decision and Direction of Election, a request for review may be filed at any time following the Regional Director's decision until 14 days after a final disposition of the proceeding by the Regional Director. A "final disposition" occurs when the regional director issues a certification of representative, a certification of results, a dismissal, or an order to open and count challenged ballots. In this case, the certification of representative issued on October 5. The Board issued an extension of time for the Employer to file a Request for Review to October 22, 2018, so this request is timely.

This Request should be granted based upon the following grounds:

1. Substantial questions of law and policy are raised because of the absence of officially reported Board precedent related to arguments set forth herein concerning supervisory status of the dispatch supervisors where those positions are consistently excluded from bargaining units.

2. The Regional Director's decisions on substantial factual issues concerning unit determination issues are clearly erroneous and prejudicially affect the rights of the Employer.

II. BACKGROUND AND OVERVIEW

The Union filed a petition for election on November 22, 2017. The Union sought an election in the following unit:

All full-time and regular part-time dispatch supervisors employed by the Employer, at its Hyattsville, Maryland facility, but excluding drivers, dispatchers, temporary agency employees, office clerical employees, professional employees, managerial employees, and supervisors as defined in the Act.

A hearing officer of the Board held a hearing in this matter on December 4 and 5, 2017, to determine whether dispatch supervisors met the definition of supervisors under Section 2(11) of the Act. In the Decision, the Acting Regional Director concluded the Employer's dispatch supervisors did not meet definition of statutory "supervisors" under the Act and ordered an election, which was held on September 13, 2018. The Acting Regional Director's decision ignored the significant evidentiary record related to the supervisory status of the dispatch supervisors, misapplied established Board case law, and, therefore, should be overturned.

III. ISSUE

Whether the Board should overrule the Regional Director's decision that dispatch supervisors meet the statutory definition of supervisors under Section 2(11) of the Act. Specifically, whether these individuals responsibly direct and assign work to the other, already-represented employees at the Fermi 2 Nuclear Power Plant.

IV. SUMMARY OF BACKGROUND FACTS

MV Transportation provides, among other things, dispatch services to the Washington Metropolitan Area Transit Authority ("WMATA") related to its para-transit operations. Pursuant to its contract with WMATA, MV Transportation employs about sixty (60) dispatchers who perform dispatch services, and fourteen (14) dispatch supervisors who oversee the performance of the dispatchers. The dispatchers and dispatch supervisors work out of the same call-center facility located in Hyattsville, Maryland.

Dispatch supervisors report to the Company's dispatch managers and ultimately to the Director of the Operations Central Center. As discussed below, the dispatchers at the Hyattsville facility report directly to the dispatch supervisors. The dispatchers at Hyattsville facility are currently represented by Amalgamated Transit Union Local 1764 (the "Union"). [Tr. pp. 24-25; Emp. Ex. 2.]

The collective-bargaining agreement covering the dispatchers sets forth disciplinary policies. [Emp. Ex. 2.] Local 1764's agreement sets out a four-step policy--oral reprimand, written reprimand, suspension, discharge--and states that the Employer "generally" follows those steps for "most" infractions, but reserves the right "to repeat steps as necessary or skip steps entirely for more serious infractions." The agreement includes a non-exhaustive list of infractions "sure to earn much more than a simple verbal

warning.” Local 1764’s agreement describes discipline as “progressive” and sets out a similar four-step system (policy review/documentated verbal counseling, written warning, second written warning, suspension). Twelve enumerated “serious” infractions, however, are grounds for immediate discharge, although the Employer may impose a lesser penalty for such infractions.¹

Dispatch supervisors are responsible for ensuring the day-to-day dispatcher operations of the paratransit services. [Tr. pp. 167, 181, 202.] By way of example, dispatcher supervisors monitor the on-time performance para-transit trips. [Tr. pp. 167, 202.] In order to meet the Company’s on-time performance obligations under its contract with WMATA, dispatcher supervisors regularly move paratransit “trips” that are running behind schedule from one driver to another. [Tr. pp. 168-170.] In performing those tasks, dispatcher supervisors are not required to consult with any manager prior to moving a trip and exercise their independent judgment in deciding which trips should be moved to which driver. [Tr. pp. 168-170, 202.]

Dispatch Supervisors are also responsible for observing the Company’s dispatchers to ensure that the operators are complying with the policies and procedures of both the Company and WMATA. Nicole Ridgeway-Ried, Director of the Operations Central Center, and Donna Snowden, Director Human Resources & Labor Relations, also testified to dispatch supervisors’ role in discipline. [Tr. pp 61.] Ridgeway–Ried testified that dispatch supervisors are trained on issuing discipline and specifically told that they have the authority to issue discipline to dispatchers. [Tr. Pp 66-68.] As part of that

¹ The Company’s employee handbook, which also covers dispatchers, contains a progressive discipline policy similar to the policy in the dispatchers’ collective bargaining agreement. [Emp. Ex. 5.]

training, dispatch supervisors are provided a copy of the Collective Bargaining Agreement that covers the dispatch employees and a copy of the Company's employee handbook. [Tr. pp.67-68.] The dispatch supervisors are instructed that they have the authority to issue and recommend discipline under the collective bargaining agreement and the Company's employee handbook. [Tr. p 68.]

Two dispatch supervisors, Carliece Shorter and John-Paul Moch, specifically testified at the hearing about dispatch supervisors' role in discipline. According to Shorter and Moch, dispatch supervisors have the authority to issue discipline to dispatchers and the authority to recommend discipline to managers regarding dispatchers. [Tr. pp. 171, 173.] Moch testified about a specific example where he recently issued discipline to dispatcher Katherine Jefferson. In that case, Moch issued Jefferson a first step verbal warning for returning late from break. Moch testified that he spoke with Jefferson and issued her a coaching and counseling form with her union representative present.² [Tr. pp. 171-172.]

Shorter testified about several specific instances in which she has issued and/or recommended discipline to employees.³ Shorter testified about an incident involving dispatcher Makeba Battle. [Tr. pp. 205-206.] Shorter explained that she issued a discipline to Battle for taking a lunch break for 82 minutes. [Tr. p. 205.] Shorter spoke with Battle prior issuing the discipline to investigate the reason why Battle was so late returning from lunch. Battle told Shorter she was late because she went to several stores

² Moch testified that he requested a blank coaching and counseling form from his manager to make sure that he had the most current form. [Tr. p. 171.] Moch further testified the he completed and signed the coaching and counseling form, not his manager. [Tr. pp. 172-173.]

³ Shorter also testified about instances that she was aware of where other dispatch supervisors issued discipline to dispatchers. By way of example, Shorter testified that dispatch supervisor Bobrine Greene has issued discipline to dispatchers for violating the Company's uniform policy. [Tr. pp. 218-219.]

looking for “Now & Laters” candy. [Tr. pp. 205-206.] Shorter testified that after speaking with Battle she determined that Battle should receive disciplinary action. [Tr. p. 205.]

Shorter also testified about an instance where she issued discipline to (former) dispatcher Diante Clark. [Tr. pp. 206-207.] Shorter explained that she issued a verbal coaching and counseling to Clark for returning late from a break. [Tr. p. 207.] Additionally, Shorter testified about issuing discipline to dispatcher Zachary Burnwell on May 23, 2017. [Tr. pp. 208-209; Emp. Ex. 6, p. 5.] Shorter explained that she issued the discipline to Burnwell because he failed to follow-up with a driver who was late to pick up a passenger. [Id.] Shorter also testified about an incident where she disciplined a dispatcher for eating at her desk.⁴ [Tr. p. 220.]

Additionally, the unrebutted testimony at the hearing showed that dispatcher supervisors have the authority to assign/re-assign dispatchers and remove dispatchers from work in certain instances, including uniform violations. Dispatch supervisors Moch, and Wade both testified that dispatch supervisors have the authority to assign/re-assign dispatchers to different work locations. [Tr. pp. 178-179, 241.] Moch specifically testified that he will move a dispatcher from one position to another based on a variety of factors, including length of service, job proficiency, and difficulty of job in question. [Tr. 178.]

ANALYSIS

1. The Employer’s Dispatch Supervisors Are Statutory Supervisors Under the Act.

MV dispatch supervisor employees are supervisors under Section 2(11) of the Act, which requires their exclusion from the petitioned-for unit. Section 2(11) of the Act states:

Section 2(11) of the Act defines the term supervisor as:

⁴ Shorter stated that she believed the dispatcher’s first name was Joanne. [Tr. p. 220.]

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-settled and frequently emphasized that the definition of supervisory status under Section 2(11) must be read in the disjunctive; possession of any one of the listed indicia is sufficient to confer supervisory status. Furthermore, it is the possession of authority to engage in any of the functions listed in Section 2(11), even if this authority has not yet been exercised, that determines whether an individual is a supervisor. *Wal-Mart Stores*, 340 NLRB 220, 223 (2003); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 Fn.8 (2001); *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1991). The burden to establish supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

Notably, the Acting Regional Director concluded that “[a]s a whole, I find that the record is sufficient that dispatch supervisors can issue discipline or effectively recommend discipline as part of a progressive disciplinary system.” [Decision p. 27.] However, the Acting Director incorrectly determined that the evidence did not establish that dispatch supervisors exercise independent judgment when doing so. [Id.] The Acting Regional Director also found that the dispatch supervisors lacked the authority to assign or responsibly direct employees. [Decision p. 38.] The Acting Regional Director’s conclusions on these issues were arbitrary and capricious and ignored, misapplied established Board law, and prejudiced MV.

There is substantial and un rebutted evidence in the record that dispatch supervisors have the authority to direct and employees who report to them and exercise independent judgment when do so and when issuing and/or recommending discipline to their direct reports.

2. Dispatch Supervisors have the authority to assign, the responsibility to direct, and exercise independent judgment.

In *Oakwood Healthcare*, the Board defined the following terms and phrases contained in NLRA Section 2(11): “assign,” “responsibly to direct,” and ““independent judgment.” First, the Board held that, in Section 2(11), the term assign refers to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. *Oakwood Healthcare*, 348 NLRB at 689.

The Board in *Oakwood Healthcare* distinguished between giving an employee significant overall duties or tasks to perform, which is to assign, and giving an employee an “*ad hoc* instruction [to] perform a discrete task,” which is to direct. *Id.* The Board also made clear that a putative supervisor assigns when he or she gives an employee significant overall duties for the duration of a shift. *Id.* at 695 (finding that charge nurses assigned when they matched staff to “the patients that they [would] care for over the duration of the shift”).

Second, as indicated above, a putative supervisor “directs” when he or she gives an employee an “*ad hoc* instruction [to] perform a discrete task.” *Id.* at 689. However, Section 2(11) requires that direction be “responsible,” and the Board in *Oakwood Healthcare* stated that “for direction to be “‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the

other.” Id. at 691-692 (emphasis added). The Board further explained that “to establish accountability for purposes of responsible direction,

it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id. at 692.3

Third, the Board in *Oakwood Healthcare* held that “to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 692-693. The Board further explained that a judgment is not independent if it is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. at 693.

i. Dispatch supervisors have authority to assign employees and exercise independent judgment in doing so.

The undisputed evidence shows that dispatch supervisors have authority to assign dispatchers that they supervise. The evidence shows that (i) although most dispatchers have regular “base” assignments, dispatch supervisors regularly assign probationary employees to various work assignments; (ii) dispatch supervisor Moch testified without contradiction that he, without review from management, moves dispatchers to easier positions if they are having difficulties performing their job on a particular base assignment; (iii) dispatch supervisors Shorter, Moch, and Wade all testified that they instruct dispatchers under their supervision to reassign trips in order to attempt to

maintain the Company's on time performance requirements and thus avoid liquidated damages from being assessed against the Company from WMATA; and (iv) dispatch supervisor Moch testified that he alters work assignments of dispatchers when there is a "call out" by a driver. The undisputed evidence shows that dispatch supervisors give employees significant overall duties to perform for the duration of a shift, which establishes that dispatch supervisors possess authority to assign within the meaning of NLRA Section 2(11). See *Oakwood Healthcare*, 348 NLRB at 689, 695.

The undisputed evidence also establishes that dispatch supervisors exercise independent judgment when directing employees under their supervision. By way of example, independent judgment is exercised when a dispatch supervisor directs a dispatcher to reassign a trip from one driver to another in order to avoid late trip for passengers and the assessment of monetary penalties onto MV from WMATA in the form of liquidated damages. Dispatch supervisors also exercise independent judgment when they assign dispatchers work. Moch testified, for example, that he reassigns poor performing dispatchers. Moch testified that in doing so he considers a variety of factors, including the employee's skill level and difficulty of the job assignment in deciding where to reassign the employee. Thus, dispatch supervisors exercise independent judgment in assigning employees. See *Id.* at 698 (finding that a charge nurse exercises independent judgment in assigning subordinate nurses when he or she "makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients").

ii. Dispatch supervisors have authority and responsibility to direct employees and exercise independent judgment in doing so.

The evidence presented at the hearing shows, among other things, that dispatch supervisors (i) monitor dispatchers' performance and whether required reports are being completed; and (ii) direct dispatchers to complete uncompleted tasks and to finish tasks in a timely manner. With regard to accountability, the evidence conclusively showed that dispatch supervisors can and do take corrective action if assignments are not handled properly. *See Oakwood Healthcare*, 348 NLRB at 692 (stating that authority to take corrective action is an aspect of accountability). In this regard, the evidence that dispatch supervisors counsel dispatchers for taking extended breaks and failing to make sure that para-transit operators arrive to their assigned trip on time or report the basis for the delay. The evidence presented at the hearing also showed that dispatchers have been disciplined for incidents reported by dispatch supervisors. The evidence plainly demonstrates that dispatch supervisors regularly exercise independent judgment in directing employees.

iii. Dispatch Supervisors exercise independent judgment when issuing or recommending discipline to their direct reports.

Substantial evidence shows that dispatch supervisors exercise independent judgment when issuing or recommending discipline. In her decision, the Acting Regional Director incorrectly conflates the level of discipline that is issued to an employee under the Employer's employee handbook or the applicable collective bargaining agreement with whether or not discipline should be issued at all. In doing so the Acting Regional Director applied an incorrect standard of proof.

The Acting Regional Director also ignored and/or significantly discounted substantial and un rebutted evidence that was presented at the hearing the dispatch supervisors exercise their independent judgment in determining whether to assess and/or recommend discipline in a wide range of situations including: (1) violations of MV's attendance policy; (2) violations of MV's break policy; (3) violations of MV's cell phone policy; (4) violations of MV's no-eating at work station policy; and (5) violations of the Company's uniform policy—including sending employees home without pay for such violations. Once again, the Acting Regional Director applied a higher standard of proof to the evidence than the "preponderance of evidence" standard required under the law.

CONCLUSION

The preponderance of the evidence plainly demonstrates that the Company's dispatch supervisors are statutory supervisors under the Act. As discussed above, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is not necessary that the employee be required regularly and routinely to exercise the powers set forth in the statute. It is the existence of the power which determines whether an employee is a supervisor. *Ohio Power Co. v. N.L.R.B.*, 176 F.2d 385 (6th Cir.), cert. denied, 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553. Individuals are considered

“supervisors” under the Act if (1) they hold authority to engage in any one of twelve listed supervisory functions, (2) their exercise of such authority is not of merely routine or clerical nature, but requires use of independent judgment, and (3) their authority is held in employer’s interest. National Labor Relations Act, § 2(11), 29 U.S.C.A. § 152(11); *Rochelle Waste Disposal, LLC v. N.L.R.B.*, 673 F.3d 587, 192 L.R.R.M. (BNA) 3061 (7th Cir. 2012).

In this case, the overwhelming evidence presented at the hearing demonstrates that the Company’s dispatch supervisors meet the required factors as statutory supervisors under the Act. In short, the evidence shows that dispatch supervisors have the authority to discipline, assign, and direct employees in the Company’s interest. The evidence also shows that dispatch supervisors exercise independent judgment when exercising their supervisor responsibilities.

Simply stated, the Acting Regional Director’s decision ignores the substantial evidence in this case and established Board precedent. The Acting Regional Director’s decision also ignores the decision of the previous Acting Regional Director’s decision in Case 05-CA-213447. In that case, a former dispatch supervisor at the Company’s facility in Baltimore, Maryland claimed that she was not a supervisor under the Act. The Acting Regional director at that time found (on a much less developed record) that the Charging Party was in fact a supervisor under the Act.

Based upon the foregoing and the entire record in this matter, the Acting Regional Director’s Decision must be overturned and the election results overturned.

DATED this 22nd day of October, 2018

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Employer's Request for Review was filed and served on this 22nd day of October 2018, as follows:

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